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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. ...240

PAUL E. McDANIEL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI

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Petitioner, Paul E. McDaniel, criminally accused, prays that a Writ of Certiorari issue to review the judgment herein of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on April 7, 1965, and the denial of Petitioner's motion for rehearing entered on May 11, 1965. The basic and fundamental issues herein are the misinterpretation and misapplication by the Court of an act of Congress codified as Title 28, U.S.C.A., Section 1732(a), a denial of rights guaranteed by the Fifth and Sixth Amendments of the United States Constitution, a misinterpretation and misapplication of the United States Supreme Court's decision in *Palmer* v. *Hoffman,* a denial of Petitioner's request that the trial court's instructions to the jury be reduced to writing and made available to the jury during their deliberations, and

a substitution in the charge to the Jury of a statutory construction of Title 15, U.S.C.A., Sections 77 et seq, and 78 et seq, in place of the charges as contained in the Indictment. The cumulative effect of the above being a denial of the Petitioner's constitutional rights. Special and important fundamental reasons exist for the granting of the writ of certiorari.

OPINIONS BELOW

The District Court, without a written opinion, rendered its judgment.

The opinion of the Court of Appeals for the Fifth Circuit will be found at pages 6a through 14a, Appendix B.

JURISDICTION

The judgment of the Court of Appeals is dated April 7, 1965, and was entered on the same date. Petitioner's motion for rehearing was overruled without opinion May 11, 1965. The jurisdiction of this Honorable Court is invoked under the provisions of Title 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

Seven basic questions are presented in this case, all of which involve important questions of Federal law. These questions may be briefly described as follows:

(1) Can a memorandum qualify as a corporate business record in a criminal proceeding within the terms of Section 1732(a); Title 28, U.S.C., and be admissible in evidence over the objection of an individual defendant, when the memorandum is: (a) prepared for the purpose of litigation, (b) written in the langauge and style of a pleading to be read to the jury, (c) the only memorandum of its nature ever prepared

during the history of the corporation, (d) unsigned and (e) the author of which is unknown and some of the contributors unknown and unidentified?

(2) Was the petitioner denied his constitutional rights under the Sixth Amendment to confrontation by his accusers and to cross-examine them by admission in evidence, over his objection, of an unsigned memorandum, the author of which is unknown and some of its contributors unknown and unidentified, with one identified contributor being a co-defendant unavailable for cross-examination because he chose not to testify?

(3) Was the trial court's refusal of petitioner's request that the court's lengthy and complex charge to the jury be submitted to the jury in writing for its deliberations such an abuse of discretion as to constitute a denial of the constitutional guarantees of due process and a fair trial before an impartial jury?

(4) Was the petitioner denied due process of law guaranteed by the Fifth Amendment because the trial court failed to charge the jury, as timely requested by petitioner, that the allegations of the Indictment are not evidence?

(5) Did the trial court commit reversible error in overruling petitioner's objections to Government's exhibits nos. 1256, 1257, 1258, 1259, 1260, 1263, 1264 and 1265, and admitting them in evidence when no sufficient predicate was laid establishing that said exhibits were based upon evidence already in the record?

(6) Did the trial court commit reversible error in overruling petitioner's objections to Government's exhibits nos. 1256, 1257, 1258, 1259, 1260, 1263, 1264 and

1265, and admitting said exhibits into evidence when said exhibits constituted an individual personal creation and interpretation, and were not summaries?

(7) Did the district court commit reversible error as a matter of law in overruling petitioner's motions for judgment of acquittal as to Counts 2 through 56 of the Indictment, (excluding Counts 7, 8, 13, 30, 32, 33, 34, 45, 46 and 49, on which acquittals were granted by the Court), made at the close of the Government's case and at the close of all the evidence, and in submitting said "remaining" counts of the Indictment to the jury, and overruling petitioner's motions for judgment of acquittal as to said counts of the Indictment made after receipt of the verdict, and in overruling petitioner's alternative motions for a new trial as to said counts of the Indictment made under Rule 33 of the Federal Rules of Criminal Procedure, and in rendering judgment based on the jury's verdict under said counts of the Indictment, when there was no substantial and competent evidence in the record to sustain such rulings, submissions, verdicts and judgment, under the language of the Indictment?

STATUTES INVOLVED

The Statutes involved are (Appendix A):

United States Constitution, Amendment V.
United States Constitution, Amendment VI.
Title 18 U.S.C. Section 371; Conspiracy;
Title 15 U.S.C. Section 77q(a); Fraudulent interstate transactions;
Title 15 U.S.C. Section 77e; Prohibitions relating to interstate commerce and the mails;
Title 15 U.S.C. Section 78a;
Title 15 U.S.C. Section 78ff; Penalties
Title 15 U.S.C. Section 781(a)(2); Registration requirements for securities

STATEMENT OF THE CASE

On July 10, 1962, Petitioner, together with George A. Mellen, Hinton Haynes and Calvin L. Allen, was indicted on one Count of Conspiracy to Violate the Securities Act of 1933 and the Securities and Exchange Act of 1934, and on fifty-five (55) counts charging violations of Section 77, et seq, Title 15, United States Code.

On November 4, 1963, Petitioner filed his Motion for Relief from Prejudicial Joinder of the conspiracy count from the substantive counts, which said Motion was overruled.

On November 4, 1963, the case proceeded to trial before a Jury.

On November 20, 1963, all parties rested. On November 21, 1963, the Trial Court granted a Motion for Judgment of Acquittal as to the Defendant, Calvin L. Allen. On November 23, 1963, after both parties had rested, the Jury acquitted Defendant, Hinton Haynes, and found Petitioner guilty on all counts of the indictment save and except Counts Number Seven, Eight, Thirteen, Thirty-two, Thirty-three, Thirty-four, Forty-five, Forty-six and Forty-nine, which latter counts had been withdrawn by the Court from the jury's consideration.

Petitioner having made timely Motions for a Judgment of Acquittal, at the close of the government's case as to Counts One through Fifty-six of the Indictment and at the close of all evidence, on November 26, 1963, filed his Motion in Arrest of Judgment as to the remainder Counts Two through Fifty-six of the Indictment upon which he was convicted. All Petitioner's Motions for Judgment of Acquittal and his alternative Motion for a New Trial, were denied. On December 30, 1963, pursuant to the verdict of the Jury as aforesaid, the Judge of the United States District Court

for the Southern District of Texas, Houston Division, adjudged that Petitioner was guilty as charged and convicted on Counts One, Two, Three, Four, Five, Six, Nine, Ten, Eleven, Twelve, Fourteen, Fifteen, Sixteen, Seventeen, Eighteen, Nineteen, Twenty, Twenty-one, Twenty-two, Twenty-three, Twenty-four, Twenty-five, Twenty-six, Twenty-seven, Twenty-eight, Twenty-nine, Thirty, Thirty-one, Thirty-five, Thirty-six, Thirty-seven, Thirty-eight, Thirty-nine, Forty, Forty-one, Forty-two, Forty-three, Forty-four, Forty-seven, Forty-eight, Fifty, Fifty-one, Fifty-two, Fifty-three, Fifty-four, Fifty-five and Fifty-six, and that he be committed to the custody of the Attorney-General, or his authorized representative for imprisonment for a period of eighteen (18) months on each of Counts One, Two, Three, Four, Five, Six, Nine, Ten, Eleven, Twelve, Fourteen, Fifteen, Sixteen, Seventeen, Eighteen, Nineteen, Twenty, Twenty-one, Twenty-two, Twenty-three, Twenty-four, Twenty-five, Twenty-six, Twenty-seven, Twenty-eight, Twenty-nine, Thirty and Thirty-one, to run concurrently; that he was further committed to the custody of the Attorney-General or his authorized representative for a period of five years on each of Counts Thirty-five, Thirty-six, Thirty-seven, Thirty-eight, Thirty-nine, Forty, Forty-one, Forty-two, Forty-three, Forty-four, Forty-seven, Forty-eight, Fifty Fifty-one, Fifty-two, Fifty-three, Fifty-four, Fifty-five and Fifty-six, the sentences to run concurrently with each other but consecutive to the concurrent sentences imposed on Counts One, Two, Three, Four, Five, Six, Nine, Ten, Eleven, Twelve, Fourteen, Fifteen, Sixteen, Seventeen, Eighteen, Nineteen, Twenty, Twenty-one, Twenty-two, Twenty-three, Twenty-four, Twenty-five, Twenty-six, Twenty-seven, Twenty-eight, Twenty-nine, Thirty and Thirty-one, it being further provided in the Judgment that the execution of sentences on Counts Thirty-five, Thirty-six, Thirty-seven, Thirty-eight, Thirty-nine, Forty, Forty-

one, Forty-two, Forty-three, Forty-four, Forty-seven, Forty-eight, Fifty, Fifty-one, Fifty-two, Fifty-three, Fifty-four, Fifty-five and Fifty-six be suspended, and Petitioner be placed on probation for five (5) years with supervision. It was Adjudged that Petitioner be fined in the sum of THREE HUNDRED AND NO/100 ($300.00) DOLLARS on each of Counts One, Two, Three, Four, Five, Six, Nine, Ten, Eleven, Twelve, Fourteen, Fifteen, Sixteen, Seventeen, Eighteen, Nineteen, Twenty, Twenty-one, Twenty-two, Twenty-three, Twenty-four, Twenty-five, Twenty-six, Twenty-seven, Twenty-eight, Twenty-nine, Thirty, Thirty-one, Thirty-five, Thirty-six, Thirty-seven, Thirty-eight, Thirty-nine, Forty, Forty-one, Forty-two, Forty-three, Forty-four, Forty-seven, Forty-eight, Fifty, Fifty-one, Fifty-two, Fifty-three, Fifty-four, Fifty-five and Fifty-six for a cumulative total of FOURTEEN THOUSAND ONE HUNDRED AND NO/100 ($14,100.00) DOLLARS and that Petitioner be acquitted as to Counts Seven, Eight, Thirteen, Thirty-two, Thirty-three, Thirty-four, Forty-five, Forty-six and Forty-nine upon the Court's granting his Motion for Judgment of Acquittal.

Petitioner filed his Notice of Appeal on December 30, 1963, together with his cash costs of Appeal Bond, which was received by the Clerk of the Court, and the 3rd day of January, 1964, he filed his Second Motion in Arrest of Judgment.

Petitioner filed his Designation of Contents of Record on Appeal on January 9, 1964, and upon such Record he brought his Appeal before the Court of Appeals for the Fifth Circuit. On January 13, 1965, it was submitted to that Court on record and briefs filed on joint request of counsel.

On April 7, 1965, the Fifth Circuit Court of Appeals affirmed the judgment of the District Court. (See Appendix B).

April 28, 1965, Petitioner filed a Motion for Rehearing before the Appellate Court, and a brief in support of Petition for Rehearing which was denied by that Court on May 11, 1965. (See Appendix B).

Petitioner now timely files herein his Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

REASONS FOR GRANTING THE WRIT

1. Exhibit 986 was not admissible in evidence as a business record in the criminal proceeding.

Petitioner was grievously prejudiced and denied a fair trial by the District Court's ruling, approved by the Court of Appeals, admitting as evidence against petitioner, over objections, a memorandum from the files of Ambrosia Minerals, Inc. (Govt. Ex. 986) which the prosecuting attorney read to the jury (R. 264-270) entitled "Transactions Detrimental to Ambrosia Minerals, Inc.", and expressly prepared for litigation by an unknown author, written in emotional and accusatory language, and based upon the opinions, views and recollections of many contributors, some of whom were unknown or unidentified. The District Court's ruling that this document was admissible in evidence against petitioner in a criminal case as a business record of said corporation under 28 USC 1732(a) is, we submit, contrary to this Honorable Court's decision in *Palmer* v. *Hoffman,* 318 U.S. 109, 63 S. Ct. 477, 87 L. Ed. 645 (1943), and is reversible error. If said statute properly can be so construed, then, so construed and applied, it violates petitioner's rights under the Sixth Amendment to the

Constitution of the United States to be confronted by his accusers and to cross-examine them.

Exhibit 986 is an unsigned memorandum of material that was compiled by some of the officers of Ambrosia Minerals, Inc., and other unknown contributors in preparation for a lawsuit against this petitioner (R. 252). Some of the contents thereof came from the company's records, some from the memory or opinion or prejudices of the officers who participated in its preparation and some from many other unidentified sources (R. 254, 255). The witness used by the government to qualify this exhibit could not testify as to the source of certain allegations therein nor did he know who was its author (R. 255). It was a final draft made after previous review of an earlier draft by an attorney retained by the company to sue this petitioner and others (R. 255). It was prepared in late October or early November, 1957 (R. 258), whereas the matters with which it purports to deal allegedly occurred at various times between some unknown date prior to October 30, 1956 (R. 264) and some unknown date prior to October 4, 1957 (R. 265).

While it would not be material had there been any such evidence, there is no evidence that any similar memorandum was ever made during the entire history of this company. The memorandum had no application to and certainly was not in the inherent nature of the mining and milling business of the company nor could it or any similar writing conceivably be systematically employed for the conduct of its regular business. It is not written in the factual, impersonal language of a business record but in the emotional and accusatory language of a plaintiff's pleading. The document admittedly and obviously was prepared solely for contemplated litigation. The witness who identified it said: "In fact, the exhibit of the final draft, I believe you will

find it follows almost verbatim — not verbatim, but very closely to Mr. Bezoni's pleadings in the lawsuit." (R. 262).

It was entitled "Transactions Detrimental to Ambrosia Minerals, Inc." and was read by the prosecutor to the jury (R. 264-270). Some of the inflammatory and prejudicial statements contained therein are that:

(1) "all of these actions were taken for the purpose of placing a *false evaluation* upon the stock of Ambrosia Minerals, Inc." (R. 266);

(2) "McDaniel and Mellen — caused Ambrosia Minerals, Inc. to execute their *unconscionable* contract with Twentieth Century Fuels, Inc." (R. 267); and

(3) "it was known to McDaniel and Mellen, or could have been determined by them that Ambrosia Minerals, Inc., *could only suffer a loss* by reason of said contract." (R. 267)

It is inconceivable that Exhibit 986 should be received in evidence as a business record under the Statute. The foregoing facts demonstrate and the writing shows on its face that it is not a business record kept in the ordinary course of business of any corporation. The nature of the document, its language and its contents were of the most prejudicial nature to this petitioner. It certainly was not the intent or purpose of Congress in the enactment of the Statute, which merely codifys the Shop Book Rule, to permit writings of this nature to be received in evidence as exceptions to the Hearsay Rule in any case.

This Honorable Court has previously held factual contemporaneous accident reports inadmissible in civil litigation because they were not business records within the Statute. To hold a writing such as Exhibit 986 admissible against a defendant in a criminal case is, we submit, unthinkable and wholly unsupported by the language or the history or the manifest Congressional intent of the Statute.

Such ruling conflicts with the holdings of this Honorable Court in *Palmer* v. *Hoffman*, 318 U.S. 109, 115, 63 S. Ct. 477, 87 L. Ed. 645 (1943).

This Honorable Court, in an opinion by Mr. Justice Douglas, has construed Section 1732 as extending to records made in the regular course of business,

> "But 'regular course' of business must find its meaning in the *inherent nature of the business in question* and in the methods *systematically employed for the conduct of the business as a business.*"* *Palmer* v. *Hoffman*, 318 U.S. 109, 115, 63 S. Ct. 477, 87 L. Ed. 645 (1943).*

At page 113 the Court said:

> "* * * *It is not a record made for the systematic conduct of the business as a business. An accident report may affect that business in the sense that it affords information on which the management may act. It is not, however, typical of entries made systematically or as a matter of routine to record events or occurrences, to reflect transactions with others, or to provide internal control.* The conduct of a business commonly entails the payment of tort claims incurred by the negligence of its employees. But the fact that a company makes a business out of recording its employees' version of their accidents, does not put those statements in a class of records made 'in the regular course' of the business within the meaning of the Act."

The Court emphasized, p. 114:

> "* * * If the Act is to be extended to apply not only to a 'regular course' of a business but also to any 'regular course' of conduct which may have *some relationship* to business, Congress not this Court must extend

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* Emphasis added throughout brief.

it. Such a major change which opens wide the door to avoidance of cross-examination should not be left to implication. * * *

"In short, it is manifest that in this case those reports are not for the *systematic* conduct of the enterprise as a railroad business. *Unlike payrolls, accounts receivable, accounts payable, bills of lading and the like,* these reports are calculated for use essentially in the Court, not in the business. Their primary utility is in litigating, *not in railroading.*"

Exhibit 986 does not come within the statutory provisions of Title 28 U.S.C.A., Section 1732(a), therefore it is not a permissible exception to the hearsay rule. Statutory language that creates an exception to the hearsay rule is to be strictly construed — particularly in criminal actions.

The reasoning behind the admission of business records under Title 28, United States Code, Section 1732(a) — and under the Federal Shop Book Rule upon which this Statute is based — is that books of account and business records, although clearly hearsay, should be admitted because of their inherently trustworthy character. Congress did not express an intention to open the door to so-called "business reports" and "self-analysis" prepared for litigation, that "follows almost verbatim" the "pleadings in the lawsuit" saturated with biased and self-serving opinions and conclusions by the writers as Exhibit 986.

If documents such as Exhibit 986 are to be raised to the level of "business records" we have a real perversion of a rule which was basically designed to facilitate admission of records which experience has shown to be quite trustworthy.

"The result would be that the Act would cover any system of recording events or occurrences provided it was 'regular' and though it had little or nothing to do

> with the management or operation of the business as such. . . . The probability of trustworthiness of records because of *the routine reflections of the day-to-day operations of the business would be forgotten as a basis of the rule.*" *Palmer* v. *Hoffman, supra,* at page 113.

The Appellate Court's affirming the admissibility of Exhibit 986 into evidence as a "business record" follows a dangerous course. It is clearly conceivable that the type of "business records" allowed here, and in future criminal prosecutions, extends to and includes any "self-analysis" or "white-washing" prepared at the direction of vindictive corporate officials with knowledge of the purpose for which purported business records could be used in a criminal action against an accused. Such an evidentiary sledge hammer has no place among the business records countenanced by Section 1732(a) — particularly in a criminal action. Suppose an officer of a corporation has been attacked or libeled or slandered by other officers for suspected defalcations, and the Board of Directors subsequently orders a report to it, knowing of the possibility that the discharged officer might be indicted for the alleged defalcations. Would not that report be expected to contain self-serving declarations and grievances to justify the actions of some of the corporate officials still in the employ of the corporation? Such a report could well be prepared and worded with such emotional terms as "unconscionable contract", "false evaluation" or even "fraudulent actions", "embezzlement", "swindling" or "theft", with knowledge that it might be used against an accused in a criminal action. Under the decision of the Appellate Court in this case, such purported "business records" would be admissible.

The holding of the Appellate Court opens wide the door to abuses under Section 1732(a), Title 28, U.S.C., clearly beyond the necessary and reasonable boundaries contem-

plated by its legislative authors and the United States Supreme Court, and circumvents the constitutional guarantee of confrontation of witnesses and opportunity for cross-examination by the accused in criminal cases.

2. Petitioner was denied his Constitutional Right to be confronted by his accusers and to cross-examine them by the Court's allowing Exhibit 986 in evidence as a purported "business record."

The Sixth Amendment, a part of our Bill of Rights, provides in part that:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."

In addition to the author of Exhibit 986 as well as the identity of some of its contributors being unknown, one of the identified contributors, Mr. Hinton W. Haynes (R. 252-260) was jointly charged with Petitioner as a co-defendant. Mr. Haynes exercised his right not to testify, and this petitioner was denied an opportunity to cross-examine Mr. Haynes for the purpose of testing his truthfulness, veracity and recollection at to matters allegedly supplied by Mr. Haynes in compiling said Exhibit. Because the witness used by the Government could not "tell where this information came from" (R. 255) (referring to contents of Exhibit 986), Petitioner was denied his constitutional right of confrontation and cross-examination which is so invaluable in bringing out the truth in the trial of a criminal case.

If Section 1732 (a) of Title 28, U.S.C., is to be construed as being broad enough to characterize Exhibit 986 as a "business record" then such a distorted extension of Sec-

tion 1732 (a) is unconstitutional insofar as it pertains to criminal cases. It denies the criminally accused of the right to be confronted by his accusers — those persons allegedly authoring statements contained in Exhibit 986 — and to expose their testimony to the invaluable test of cross-examination.

As a part of our Bill of Rights, our Supreme Court has historically sought, and rightfully so, to jealously guard our constitutional guarantees. A provision of our Bill of Rights, the right of confrontation by accusers in a criminal trial is so fundamental and essential to a fair trial as to be made obligatory upon the courts of this land.

Petitioner recognizes that legitimate exceptions to the Hearsay Rule can be made; however, the Sixth Amendment precludes exceptions, present and future, created by Congress or lower courts, such rule, to whenever the effect is to abolish a basic constitutional right of an accused in a trial for his very freedom.

This Honorable Court laid out the supreme law of the land and the legal requirements to be applied in all criminal cases in *Mattox* v. *United States*, 156 U.S. 237, 242-243, 15 S. Ct. 337, 339, 39 L. Ed. 409 (1895):

> "The primary object of the constitutional provision in question was to prevent deposition or ex parte affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony, whether he is worthy of belief."

Recently in *Douglas* v. *State of Alabama,* decided April 5, 1965, reported in Supreme Court Reporter Advance Sheet as 85 S. Ct. 1074, (other citations unavailable), in an opinion by Mr. Justice Brennan, the court held that the state defendant's inability to cross-examine a witness, who had been convicted for the same crime and refused while acting in his own interests to answer any questions in reliance on privilege against self-incrimination as to the witness' alleged confession which implicated Defendant and which was read to the jury by prosecutor, constituted a denial of Defendant's right of cross-examination secured by the confrontation clause of the Sixth Amendment.

As this Court said in *Pointer* v. *State of Texas,* likewise decided April 5, 1965, reported in the Supreme Court Reporter Advance Sheet as 85 S. Ct. 1065 (other citations unavailable at this time, at page 1068, Mr. Justice Black writing for the Supreme Court,

> "There are few subjects, perhaps, upon which this court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."

A consideration for the lack of opportunity for cross-examination was significant to this Honorable Court in affirming the Trial Court's excluding purported business records in *Palmer* v. *Hoffman, supra,* a civil action.

Petitioner respectfully urges that the court erred in affirming the admission of Government's Exhibit 986 as a business record and in failing to grant Petitioner's Motion for Mistrial based upon its admission and reading to the jury. The reading of this Exhibit to the jury and its admission into evidence necessarily created such prejudice

in the minds of the jury that Petitioner could not receive a fair and impartial trial. The rank hearsay combined with pure conjecture, speculation and hostile opinions contained in this memorandum is the only evidence in this entire record which undertakes to show a conspiracy involving the Petitioner. Without this objectionable memorandum, the evidence is confined to isolated facts and inferences and unconnnected transactions which are not *substantial* evidence of themselves of the participation of the Petitioner in any criminal conspiracy. The admission of this document was plain error causing manifest injustice and gross prejudice to the constitutional and substantive rights of Petitioner.

3. The District Court's arbitrary refusal of Petitioner's request that the charge to the jury be submitted in writing during jury's deliberations was a denial of due process and a fair trial before an impartial jury.

Petitioner timely moved that the Trial Court's Charge be reduced to writing and made available to the jury during their deliberations, (R. 1505) which motion was arbitrarily denied by the Trial Court and such denial was affirmed by the Appellate Court. In view of the complexity of the Indictment, the evidence, and the Court's lengthy Charge, the only way to be assured that each member of the jury did in fact receive, understand and remember the importance of the Court's instructions would have been to send a copy of the Court's Charge to the jury room for their use, benefit and guidance during their deliberations. The resulting prejudice to Petitioner becomes clear when the Court ordered the jury to take the *written* Indictment into the jury room (R. 1674) to aid them, but a *written* Charge as to the law was denied them. During the jury's deliberations for a verdict, they possessed the written indictment, containing inflammatory accusations, and bits

and pieces of a part of the applicable law. The jury was denied possession of a written document that set out the whole law which they were to apply to the evidence they had heard, seen and believed to be true.

The Trial Court's oral instructions to the jury as to all the applicable law consisted of approximately ten thousand five-hundred (10,500)* spoken words. The jury admitted confusion and difference of opinion as to the Trial Court's verbal instructions (R. 1676). Our concept of justice is questionable if we believe twelve jurors could hear this flood of words, remember their significance and apply the substance and meaning of approximately 10,500 words to their recollection of the evidence without partiality and without compromise. Doesn't a rereading of only a small part of the Court's instructions perforce place undue emphasis upon and single out that part of the instructions reread to the jury?

The Court's Charge contained a number of terms and definitions, some of which had to do with general elements of the criminal law, and others with the securities business. They were all matters as to which the jury needed instruction and adequate guidance.

> ". . . it is frequently desirable that instructions which have been reduced to writing be not only read to the jury but also handed over to the jury. This course is required in some states and it is widely practiced. United States Courts are free to follow it. We see no good reason why the members of a jury should always be required to debate and rely upon their several recollections of what a Judge said when proof of what he said is readily available." *Copeland* v. *United States,* 152 F. 2d 769, 770, (C.A., D.C., 1945); *Carrado* v. *United States,* 210 F. 2d 712, 722, (C.A., D.C., 1953).

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* Estimated as 9,000 words in Court's Charge (R. 1644-1668) plus 1,500 words in recharge to jury (R. 1680-1684).

While the submission of the written Charge is ordinarily within the discretion of the trial court, there was absolutely no substantial reason for the refusal of the Petitioner's request that a written charge be submitted to the jury during their deliberations. The Court's refusal to do so was an abuse of its discretion resulting in an injustice and denial of Petitioner's constitutional and substantive rights to a fair and impartial trial before the jury.

As was said by the trial judge in a case involving only nineteen counts, as opposed to fifty-six counts in this case:

> "Quite frankly, I do not believe that any one of you would remember all I said if I left the matter on an oral charge." Wyzanski, District Judge, *United States* v. *Danser,* 26 FRD 580, at Page 582, (D.S., Mass).

The written charge was given to the jury in that case after it was read to them, and the same procedure should have been followed here, particularly when specifically requested by Petitioner. Just as in this case,

> "The delivery of the instructions to the jury in the instant case required more than an hour. As litigation grows increasingly complex, *the jury often may be helped in their deliberations by having a copy of the instructions before them rather than sending a letter to the Court asking that the instructions on a certain point be repeated." U. S.* v. *Standard Oil Company,* 316 F. 2d 884, 896 (C.A. 7, 1963).

In this case, the jury retired to deliberate its verdict with a *written* Indictment, a mental recollection of the evidence and a speculative and confused recollection of the Court's Charge on the law. The inquiry made of the Court by the jury after their retirement (R. 1676) makes it obvious that they did not understand and/or remember the Court's Charge.

4. Defendant was denied due process of law by the District Court's failure to charge the jury that the indictment "is not evidence".

An indictment in and of itself is never evidence of the guilt of the accused. *Patterson* v. *United States,* 183 F. 2d 687 (C.A. 5, 1950). A request was made by Petitioner that the court charge:

> "The indictment which is before you is nothing more than a charge or accusation. **It is not evidence.** It is a mere accusation which has never been fully tried until you receive it in the jury box." (Emphasis added to point out the omitted instruction.)

The failure of the trial court to specifically instruct the jury that *the indictment was no evidence* of the Petitioner's guilt was plain error causing manifest injustice and gross prejudice to the constitutional and substantive rights of the Petitioner.

> "It seems settled that, where a correct proposition of law essential to the proper determination of an issue submitted to a jury is incorporated by the Defendant into a requested special instruction, which is not given in charge to the jury in substance or in effect or is not covered in the general charge of the court, refusal to give the instruction is reversible error." *United States* v. *Marcus,* 166 F. 2d, 497, 504 (C.A. 3, 1948), citing *Calderon* v. *United States,* 279 F. 556, Fifth Circuit.

The Indictment in this case was ordered by the Court to be taken into the jury room, (R. 1674). If an indictment goes to the jury room, the jury should be charged, upon request, that the indictment *is not evidence* of the facts charged therein.

Prior to giving its charge the Court assured counsel for Petitioner that the charge would be given *as requested* (R. 1510). The reliance of Petitioner's counsel on the court's statement that the charge would be so given and the failure of Petitioner's counsel to note the omission from the lengthy charge, a written copy of which was not submitted to counsel for Petitioner, of the requested and promised specific instruction "It is not evidence", did not amount to a waiver of Petitioner's rights in this regard. Rule 52(b) Federal Rules of Criminal Procedure; also *United States* v. *Raud,* 177 F. 2d, 312, 315 (C.A. 7, 1949) wherein it was stated:

> "It appears to be generally established now that — Rule 30 notwithstanding, in criminal cases involving life or liberty of a defendant, an Appellate Court may note its plain and seriously prejudicial error in the instructions, even though it was not called to the attention of the trial court."

5. No Predicate was made for admission in evidence of the Government Agent's summaries.

Objections were made by Petitioner to the admission of Exhibits Nos. 1256, 1257, 1258, 1259, 1260, 1263, 1264 and 1265, said objections being found at pages 1272, 1294, 1325, 1335, 1338, 1339 and 1345 of the Record. These exhibits were purportedly summaries based upon books and records which were *not in evidence* at the time these Exhibits were admitted into evidence. The Court's overruling objections to their admittance on this ground was clearly erroneous.

In a recent opinion, September, 1964, the Tenth Circuit Court stated, in *Conford* v. *United States,* 336 F. 2d 285, at page 287:

> ". . . when summaries are used and given to the jury, the court must ascertain with certainty that they are based upon and fairly represent competent evidence *already before the jury.*" (Citing *United States* v. *O'Connor*, 2 Cir., 237 F. 2d 466). "The jury should be advised that the summaries do not, of themselves, constitute evidence in the case but only purport to summarize the documentary and detailed evidence already *admitted;* that it should examine the basis upon which the summaries rest and be satisfied they accurately reflect other evidence in the case; and that, if not so satisfied, the summaries should be disregarded."

It is undisputed that the books and records upon which Swink's analyses and purported summaries were allegedly based were not *"already before the jury"* nor *"already admitted"* as required by the cases cited, and the Court's admission thereof over objection was erroneous.

6. Charts created by Government Agent were not summaries and were inadmissible in evidence.

The chart Exhibits 1256, 1257, 1258, 1259, 1260, 1263, 1264 and 1265 were prepared for introduction into evidence. They were not pure summaries of matter that was in evidence at the time the summaries were offered *nor* of matter that was ever placed into evidence. These Exhibits were "his *analyses* of various books and records." (R. 1303, 1306 and 1307). This is most glaringly obvious with reference to Exhibit 1256. The several "analyses" complained of herein, and objected to by Petitioner at pages 1272, 1294, 1325, 1335, 1338, 1339 and 1345 of the record and at other points by his co-defendants and introduced into evidence by the Government, represented a scrambled mass of figures. It would take a jury of mathematicians to ascertain the facts out of the confusion created by these Exhibits. The alleged justification for their admission into evidence is

that they would assist the jury in understanding and considering the evidence. They hardly serve this purpose.

These charts and analyses complained of herein, although admitted into evidence as summaries of various books and records, are not in fact summaries of such books and records. Exhibit 1256 is the charted opinion of the Government agent, Swink, used to impress and mislead — not assist — the jury. Appendix II of Exhibit 1256 points up the intent of this witness to force his own arbitrary interpretations and opinion upon the jury under the guise of being authenticated evidence.

Another example of the Government agent's efforts to distort and not summarize is found in Appendix III of said Exhibit 1256, page 1 and 2, which reflect a *loss* (R. 1280-1284); whereas Certified Audit (Exhibit 215, pages 3 through 12), by an independent firm of certified public accountants, Ernst & Ernst, covering the same period as said Appendix III, for the fiscal year ending June 30, 1957, reflects a *profit* (R. 1194-1195). The Government agent Swink did not attack the correctness or accuracy of Ernst & Ernst's certified audit of their accounting method.

It should be noted that the accounting method used by this independent firm of certified public accountants was a generally accepted accounting method.

Exhibit 1256 is a collection of bare figures presented by the Government agent, Swink. The admission into evidence of this creative collection and interpretation as a summary was misleading:

> "Whenever possible, such charts should be confined in their preparation to strictly mathematical computations, subject to detailed explanation upon the trial by the testimony of expert government witnesses, and they should not be encumbered by such impressive conclu-

> sionary captions as "Overstatement of Merchandise Purchases", "Overstatement of Delivery Expenses", "Unreported Cash Receipts of Laird's Bakery", "Unreported and Undeposited Cash Receipts Invested in United States Savings Bonds", "Unreported Net Income of Mr. E. C. Laird", "Income Tax Unreported and Unpaid by Mr. Laird", such as were used on the government charts here in dispute. While a prosecution witness may testify as to such conclusions from his mathematical computations, we think the danger in permitting the unrestricted use of such phrases upon charts results in a jury's natural tendency to accept such unsworn, conclusionary verbiage as authentic, primary proof, instead of purely in summarization and explanation of sworn testimony or authenticated documentary evidence." *Lloyd* v. *United States,* 226 F. 2d 9, 17, (C.A. 5, 1955).

There was no disclosure of the specific sources of the figures upon which these charts and analyses were made prior to their admission into evidence. The witness made vague and general references to books and records of this, that and the other corporation or this, that and the other individual encompassing the books and records of six corporations, five stock brokerage houses, four banks and four bank accounts. Nowhere in the preliminary proof was reference made to any page number or particular section or to a specific transaction reflected in the original records. In most instances there was no reference made with *any* particularity at all as to the points in the records from which the information and analysis in the Exhibits was derived and taken.

As to these Government Exhibits, the observation of the Supreme Court in *Holland* v. *United States,* 348 U.S. 121, at page 128, 75 Sup. Ct. 127, at 131, is especially appropriate:

> ". . . bare figures have a way of acquiring existence of their own, independent of the evidence which gave rise to them." See also *United States* v. *Altrada*, 224 F. 2d 935, 938 (C.A. 2, 1955).

The Fifth Circuit stated, in *Lloyd* v. *United States*, 226 F. 2d 9, at page 17:

> "The use of this type of evidence, however, 'has inherent dangers to an accused, for a jury is often unfairly and unduly impressed by the apparent authenticity of a government witness' chart computations, as such, rather than by the truth and accuracy of the underlying facts and figures supporting them. A trial court is charged with grave responsibilities in such instance to insure that an accused is not unjustly convicted in a 'trial by charts', however, impressive the array produced. Ordinarily, it would be the better practice, not so carefully observed in this instance, to require that the source of the facts and figures upon which such a chart is based be fully disclosed before its admission into evidence."

The Exhibits show on their face that they express the witness' idea of *how the various records* upon which they are allegedly based *should have been kept;* they are not summaries of the various records as they were in fact kept. Swink's treatment of the accountings is in direct variance and conflict with the methods employed in the Certified Audit (Exhibit 215) prepared by Ernst & Ernst. Swink's analyses are not based entirely upon the records of Petitioner nor of the various corporations involved, but are partly based on the *work sheets* of an accountant named Conklin, Paul McDaniel's accountant. These records were Conklin's not McDaniel's.

The witness Swink, by his own admission, gave *his analyses* of *his figures* that were later introduced into evidence.

(R. 1303, 1306 and 1307). In so doing, he testified not as to facts, but, as to his opinion of his collection and creation of figures. He couched his testimony as to his opinions in terms of fact, thereby seeking to give his opinions a greater weight than justified.

It is one thing to have isolated bits of evidence testified to, witness by witness, as parts of the whole record containing evidence favorable and unfavorable to both sides. It is quite another to permit a Government agent, armed with charts which he has prepared for the specific purpose of a criminal trial and proceed to present isolated bits of evidence in such brief and graphic form as to purport to forge the links in the chain of evidence so carefully and so convincingly as to distort and mislead a jury of twelve lay people.

The Trial Court's action in admitting these exhibits into evidence was plain error causing manifest injustice and gross prejudice to the constitutional and substantive rights of Petitioner.

7. There was no evidence to support the charges in the "remaining" counts of 2 through 56 as specifically charged in the indictment.

In submitting the substantive counts that went to the jury (Counts 2 through 56, excluding Counts 7, 8, 13, 32, 33, 34, 45, 46 and 49, to which motions for acquittal were granted), the Court charged the jury in terms of the statute and not in the terms of the counts of the Indictment, and there was no evidence to support the jury verdict under the terms of the Indictment.

The Court erroneously applied Title 15 U.S.C.A. 77(q)(a)(1) and its provisions to the mailings complained of in the Counts 2 through 56 in that the Indictment did not charge the Petitioner in the words of the Statute.

The Court's erroneous application of the Statute and its wordings and its substitution thereof for the wordings of the Indictment, puts the Petitioner in the position of being tried not on the Indictment but on the Statute as to Counts 2 through 56. The provision of the Statute is somewhat ambiguous as to the type of mailing (when, as in this case, the use of the mails is charged) that would violate the Statute; that is, whether the mails must be used (1) simply in effecting a sale or (2) in the employment of the device, scheme, or artifice to defraud. In *Getchell* v. *United States,* 282 F. 2d 681 (C.A. 5, 1960), wherein a conviction was reversed on essentially the same type of Indictment and facts, the Court went to great lengths to explain the variation between the wording of the Indictment and the wording of the Statute. Counts 2 through 56 of the Indictment, and the mailings complained of therein, could have been couched in the statutory wording. The broad interpretations that have been given to the Securities Act would perhaps then have applied, but this the Government's Indictment did not do.

In affirming Petitioner's conviction on Counts 2 through 56, the Court takes an erroneous position that inasmuch *as the mailings complained of* and other mailings testified to *but not charged in the Indictment* were, in the Court's opinion in violation of Title 15 U.S.C.A. 77(q)(a)(1), that the conviction on such of those counts as were not withdrawn by the Trial Court from the jury's consideration was valid *irrespective of the Indictment.* However, the Petitioner was not charged in the words of the Statute, but in the words of the Indictment, and Counts 2 through 56 of the Indictment specifically charge that the Petitioner did *by the use of the mails* in the offer and sale of Ambrosia stock unlawfully *employ the alleged* device, *scheme* and artifice *to defraud.* Such use of the mails being the causing to be

delivered by the mails to said named purchasers envelopes containing confirmations of a securities transaction ("remaining" Counts 2 through 36) and stock certificates, ("remaining" Counts 37 through 56). Such wording of the Indictment comes within *Getchell* v. *United States, supra.*

There was no evidence that Petitioner knowingly and wilfully caused any of the brokerage houses involved to mail any of the confirmations of transactions or stock certificates mentioned in any of the substantive counts of the Indictment to the purchasers mentioned in said counts. It cannot be said that the mailings in question were for the purpose of executing a scheme or selling the securities as the Statute requires. *Kann* v. *United States,* 329, U.S. 88, 96, 65 S. Ct. 148, 151, 89 L. Ed. 88 (1944); *Parr* v. *United States,* 363 U.S. 370, 393, 80 S. Ct. 1171, 1185, 4 L. Ed. 2d 1277 (1960). The mailing or causing the matter to be mailed in *furtherance* of the scheme is the crime, and it is vital to the commission of the offense that the matter be in furtherance of the scheme. *Stapp* v. *United States,* 120 F. 2d, 898, 899, (C.A. 5, 1941). It is not every incidental use of the mail that occurs as a result of an alleged scheme that would constitute a violation of the law. The matter must be knowingly mailed or caused to be mailed in furtherance of the scheme by the Petitioner. *Spillers* v. *United States,* 47 F. 2d 893, 894 (C.A. 5, 1931).

The brokerage houses which mailed the securities, stock certificates and confirmations (The confirmations themselves which are self-explanatory.) (Exhibits 314, 315, 316, 247, 248, 250, 297, 298, 299, 300, 1192, 304, 305, 306, 321, 322, 329, 330, 331, 335, 343, 344, 345, 267, 270, 271, 1194 through 1199) alleged in the "remaining" Counts Two through Fifty-six of the Indictment were acting as *agents for* and in behalf of the *purchasers,* not *Petitioner. Title* to the securities *passed* at the time the *purchases* were *consum-*

mated in the brokerage houses, which was *prior in time to the mailings* of the confirmations and stock certificates. Since the transactions, with regard to the stock sales, had been completed at the time of the mailings complained of, it cannot be said that the mails were used in furtherance of any alleged scheme to defraud nor even to sell the securities in question, and there being no evidence that Petitioner, or any agent of Petitioner, mailed the confirmations or the certificates complained of in the Indictment. The confirmations and stock certificates, did not purport to come from Paul E. McDaniel nor Ambrosia Minerals, Inc.

There was no evidence that McDaniel had any proprietary or other interest in any securities that were sold in the transactions described in Counts Two through Fifty. In Counts Fifty-one through Fifty-six the evidence clearly shows that the sales were by one Joel Montgomery in October and November, 1957, as pledgee in the stock and (R. 731, 749) not by McDaniel. There was no evidence that Paul E. McDaniel nor an agent of his caused these exhibits to be mailed.

Counts 46 through 50, excluding Counts 46 and 49 upon which acquittals were granted by the Trial Court, charged that Petitioner did wilfully make use of the mails to sell certain named securities, no registration statement then being in effect with the Securities & Exchange Commission, the sales having been completed prior to the mailing of the confirmations to the purchasers with their own agents, the selling brokers. The Appellate Court holds there was evidence that the mails were used regularly during the course of the alleged scheme prior to, and as a step toward, the receipt of the fruits of the alleged fraud in violation of Title 15 U.S.C. 77e(a)(1) and 77e(a)(2). However, *these are not the mailings charged in the Indictment.*

Once the alleged scheme has reached fruition, the burden is on the Government to show that subsequent mailings must be for the purpose of further executing the scheme as in *U. S.* v. *Sampson*, 371 U.S. 75, 83 S. Ct. 173 (1962), where the subsequent mailings were shown to be for the express purpose of lulling the victims of the fraud into a false sense of security. This is doubly true when the indictment is couched in the language of the *Getchell* case (supra) as was the indictment in the Petitioner's case.

The mailings of the confirmations alleged in said remaining Counts Forty-seven through Fifty did not amount to a use of the mails to sell any securities, and there was no evidence that Petitioner nor any agent of his had anything to do with those mailings which were posted after consummation of the relevant sales by agents for the purchasers. These counts allege that Petitioner knowingly and wilfully caused to be delivered by the Post Office Department certain shares of common stock of Ambrosia to certain named investors at a time when the stock was not registered.

There was no evidence to support the jury verdict under the language of the Indictment. Failure of the Court to limit its charge to the jury to the language of the Indictment and charging the jury in the broader language of the Statutes denied Petitioner his constitutional and substantive rights.

CONCLUSION

For the foregoing reasons, petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Rule 33, Title 28 U.S.C., I hereby certify that true and correct copies of this Petition for Writ of Certiorari were served upon the Solicitor General, Department of Justice, Washington 25, D.C., by personal delivery to his offices on this ..... day of June, 1965, and upon the United States Attorney for the Southern District of Texas, by personal delivery to his offices on this ..... day of June, 1965.

.....

Alton F. Curry.
Attorney for Petitioner

APPENDIX A

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Title 18 U.S.C. Section 371; Conspiracy;

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

Title 15 U.S.C. Section 77q(a); Fraudulent interstate transactions;

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly —

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Title 15 U.S.C. Section 77e; Prohibitions relating to interstate commerce and the mails;

(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly —

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments

of transportation, any such security for the purpose of sale or for delivery after sale.

Title 15 U.S.C. Section 78a; Short title;

This chapter may be cited as the "Securities Exchange Act of 1934." June 6, 1934, c. 404, § 1, 48 Stat. 881.

Title 15 U.S.C. Section 78ff; Penalties;

(a) Any person who willfully violates any provision of this chapter, or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78*o* of this title, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $10,000, or imprisoned not more than two years, or both, except that when such person is an exchange, a fine not exceeding $500,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

(b) Any issuer which fails to file information, documents, or reports pursuant to an undertaking contained in a registration statement as provided in subsection (d) of section 78*o* of this title shall forfeit to the United States the sum of $100 for each and every day such failure to file shall continue. Such forfeiture, which shall be in lieu of any criminal penalty for such failure to file which might be deemed to arise under subsection (a) of this section, shall be payable into the Treasury of the United States and

shall be recoverable in a civil suit in the name of the United States.

(c) The provisions of this section shall not apply in the case of any violation of any rule or regulation prescribed pursuant to paragraph (3) of subsection (c) of section 78*o* of this title, except a violation which consists of making, or causing to be made, any statement in any report or document required to be filed under any such rule or regulation, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact. June 6, 1934, c. 404, § 32, 48 Stat. 904; May 27, 1936, c. 462, § 9, 49 Stat. 1380; June 25, 1938, c. 677, § 4, 52 Stat. 1076.

Title 15 U.S.C. Section 78l(a)(2);
Registration requirements for securities

(a) It shall be unlawful for any member, broker, or dealer to effect any transaction in any security (other than an exempted security) on a national securities exchange unless a registration is effective as to such security for such exchange in accordance with the provisions of this chapter and the rules and regulations thereunder.

(2) Such copies of articles of incorporation, bylaws, trust indentures, or corresponding documents by whatever name known, underwriting arrangements, and other similar documents of, and voting trust agreements with respect to, the issuer and any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, the issuer as the Commission may require as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security.

Title 28 U.S.C. Section 1732(a);
Record made in regular course of business

(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term "business," as used in this section, includes business, profession, occupation, and calling of every kind.

APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21202

PAUL E. McDANIEL,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

(April 7, 1965.)

Before BROWN and BELL, Circuit Judges, and HUNTER, District Judge.

HUNTER, District Judge: Appellant, together with George Mellen and several others, was indicted on July 10, 1962 on 56 counts. Count I charged the appellant and his co-defendants with conspiracy under 18 U.S.C.A. 371 to violation of the Securities Act of 1933 and the Securities and Exchange Act of 1934. Counts 2 through 45 of the indictment each re-alleged the facts of the conspiracy by reference, and then set out a particular mailing in furtherance of the scheme in violation of Title 15

U.S.C.A. 77q(a)(1). Counts 46 through 56 involve in each instance the sale of an unregistered security through use of the mails in violation of Title 15 U.S.C.A., 77e(a)(1) and 77e(a)(2).[1]

The case proceeded to trial before a jury and appellant was found guilty on all counts, save and except nine (9) counts which were withdrawn by the Court from the jury's decision. A motion for judgment of acquittal and/or for a new trial was denied and sentence was imposed. On appeal defendant asserts failure of proof, errors in ruling upon evidence, and errors in connection with the charge to the jury.

Appellant does not attack the sufficiency of the evidence to support the verdict on Count I (the conspiracy charge), but strenuously attacks the sufficiency of the evidence as to all other counts. More particularly, he urges as to these counts (a) the mailing was done by out-

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[1] § *77q. Fraudulent interstate transactions*

"(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly —

(1) to employ any device, scheme, or artifice to defraud, * * *"

§ *77e. Prohibitions relating to interstate commerce and the mails*

"(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly —

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale."

siders who had no connection whatsoever with the alleged fraud, and (b) the scheme, if there was one, which appellant denies, in each case had reached fruition and the sales had been completed before the particular mailing occurred.

The facts relied on by the Government which the record amply supports may be generalized as follows:

Ambrosia Minerals, Inc. (hereinafter referred to as AMI) was originally organized under the name of Belmont Uncle Sam Mining Company in 1926. It was entirely inactive and without assets or liabilities for at least ten years prior to April 19, 1956, when control of it was acquired by appellant McDaniel and George Mellen. The apparent purpose of the acquisition was to utilize AMI as a vehicle for the acquisition of various other companies. As a result of acquisitions and mergers, substantial blocks of unregistered AMI stock were issued and ultimately distributed to the public by appellant McDaniel and Mellen, who either controlled several of the companies acquired by or merged with AMI, or had an interest in them. The books and records of AMI indicate that the company never operated at a profit. Nevertheless, McDaniel and Mellen, in order to induce investors to purchase the securities of AMI, artificially stimulated the market in this stock, made false and fraudulent statements, distributed false and misleading brochures, press releases, etc., and caused dividends to be issued which were not in conformity with law.

Given the conclusions as found by the jury, well documented by the record, and not contested on appeal that McDaniel was an active participant in the scheme, his argument that he was not shown to have used the mails, and that the mails were not used until after the sales had been consummated, cannot prevail. The record is replete with evidence that the mails were used regularly. The

Government presented witness after witness who testified that they had purchased stock in the swindle and had received the confirmations, and in some instances the registered stock through the mails. This was not a mere incidental use of the mails or a use made by outsiders after the fraud was consummated. The mails here were used during the scheme and afterwards. It may not have been clearly shown that the appellant knew that the confirmations and stock certificates were to be mailed, but the mailings were such an integral part of the transactions that the use of the mails for their delivery should have been foreseen and contemplated.

The evil at which the securities Act is directed is the fraud in the sale of securities. That being the congressional purpose and intendment to be covered, the impact of fraud in relation to sales should be considered in making practical application of the Act to a given set of facts. In other words, a scheme to defraud in relation to a sale of securities, and the use of the mails in consummation thereof, is the gist of the crime. The use of the mails need not be central to the scheme to defraud. *U.S.* v. *Sampson,* 371 U.S. 75, 83 S. Ct. 173, 9 L. Ed. 2d 136 (1962); *Pereira* v. *U.S.,* 347 U.S. 1, 74 S. Ct. 358, 98 L. Ed. 435 (1954); *U.S.* v. *Sheridan,* 329 U.S. 379, 67 S. Ct. 332, 91 L. Ed. 359 (1946); *U.S.* v. *Cashin,* 281 F. 2d 669, 2 C.C.A. (1960); *U.S.* v. *Monjar,* 47 F. Supp. 421 (D.C. Del. 1942), aff'd 147 F. 2d 916 (3 C.C.A. 1944), cert. den. 325 U.S. 859, 65 S. Ct. 1192, 89 L. Ed. 1979 (1945).

Pereira, supra 347 U.S. 1, is particularly applicable to the facts here. There, the Supreme Court said:

> "Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used."

Appellant relies chiefly on *Kann* v. *U.S.*, 323 U.S. 88; *Parr* v. *U.S.*, 363 U.S. 370; *Getchell* v. *U.S.*, 282 F. 2d 681, 5 C.C.A. These cases are patently distinguishable on their fact and the law applicable, and this is made manifest when we realize that here the mails were used prior to, and as a step toward, the receipt of the fruits of the fraud. To paraphrase from the Supreme Court's holding in *Sampson* (371 U.S. 75), we are unable to find anything in *Kann* or *Parr* or *Getchell* that suggests an automatic rule that a deliberate, planned use of the mails after the victim's money had been obtained can never be for the purpose of executing the scheme. It matters not whether McDaniel himself did the mailing; the use of the mails by his broker must have been fully contemplated by him, and attributed to him. We are, of course, required to view the evidence in the light most favorable to the prevailing party, and viewed in that light we unhesitatingly conclude that there was substantial evidence in the record to support the conviction on each count.

Appellant vigorously insists that the admission of Government's Exhibit 986 entitled "Transactions Detrimental to Ambrosia Minerals, Inc." into evidence was error. The exhibit was received during the testimony of John V. Person, who as President of AMI had directed that the document be prepared. Person testified that it was prepared strictly as an office memorandum and that it was a record of the company made in the course of the business of the corporation. It was prepared by various officers of the company. Appellant was a member of the Board of Directors of AMI at the time it was resolved to instigate the investigation and this exhibit is the fruit of that investigation. Business corporations often do considerable self-analysis in order to keep a taut ship. The document was originally offered as an admission against Haynes. Despite his objection to the use of the term "admission," counsel for Haynes

joined in the offer of the exhibit. After further colloquy, the Court admitted the document under the Federal Business Record Act, 28 U.S.C.A. 1732a.[2]

Counsel for McDaniel relies heavily on *Palmer* v. *Hoffman,* 318 U.S. 109, 63 S. Ct. 477. In *Palmer* the Supreme Court affirmed the Court of Appeals for the Second Circuit, which had in turn affirmed the trial court in excluding a written statement made by a railroad engineer (deceased at the time of the trial) concerning a grade crossing accident which was the subject matter of the suit. The document which was offered on behalf of the defendant railroad is the reverse of the present situation where the document in question was admitted by the trial court. The distinction is of some importance since the trial judge has an area of discretion in determining admissibility of documents as business records, and a case affirming an exclusion is not necessarily authority to reverse for an admission. Besides, in the present case the motive which made the document suspect in *Palmer* is not present. The memorandum was not designed to be put into evidence, and hence to be self-serving. Instead, it was a summary or history based upon the corporate records for use by retained counsel in advising the company. Thus, those who prepared it had every motive to make it truthful, complete and accurate. All the hallmarks of authenticity surround this document. The trial

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[2] *28 U.S.C.A. § 1732a.*

"(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such a memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter."

court committed no reversible error in admitting Government's Exhibit 986.

Appellant next argues that the admission of Exhibit 986 constituted a denial to him of his right of confrontation as guaranteed in a criminal prosecution. *The United States Constitution, Amendment VI.* This question may arise when a document falling under 28 U.S.C.A. 1732a is offered at the trial: Does that Statute transgress the right of confrontation granted by the Sixth Amendment? We do not believe that all documents covered by the Statute in all cases are admissible in a criminal trial, but the trial judge has the duty to determine in each instance whether such documents are constitutionally admissible under the Sixth Amendment guarantee of confrontation. The trial judge made no error here, and it has been customarily held that the right of confrontation may not be invoked to exclude evidence otherwise admissible under well-established legitimate exceptions to the hearsay rule. *Kay* v. *U.S.*, 255 F. 2d 476, 4 C.C.A. (1958; *Matthews* v. *U.S.*, 217 F. 2d 409, 5 C.C.A. (1954); *U.S.* v. *Leathers*, 135 F. 2d 507, 2 C.C.A. (1943); 5 *Wigmore*, Evidence, 1397.

It is next argued that the trial judge committed reversible error in overruling appellant's request that the Court's charge be reduced to writing and furnished to the jury for use during its deliberations. It is frequently desirable that instructions which have been reduced to writing be not only read to the jury, but also handed to the jury. This course is required in some states, but the United States Courts are not compelled to do so. The determination of whether or not to submit a charge in writing was within the discretion of the trial court.

Appellant also assigns as error the Court's admitting into evidence Government's Exhibit 1256, 1257, 1258, 1259, 1260, 1263, 1264 and 1265. The exhibits in question are

summaries of records which were examined by the Government's witness, James A. Swink, a certified public accountant and a member of the staff of the Securities and Exchange Commission. The exhibits were based upon the records of appellant and they were furnished to Swink at appellant's office with appellant's permission. The actual records of which the exhibits are summaries were in evidence. Mr. Swink is an expert witness and he was entitled to testify as to his conclusions concerning these records. The fact that his conclusions differed from those of the Accounting Firm of Ernst and Ernst was a matter of relative weight and was for the jury. Mr. Swink explained the reasons for the difference between his figures and those of Ernst and Ernst, who had treated results of the sham transactions of McDaniel and Mellen as profits. It was for the jury to accept or reject Mr. Swink's conclusions. The rule is that a summary of books and records is admissible, provided cross-examination is allowed and the original records are available. Here, the records of which the exhibits are summaries were in evidence and the man who prepared them was available for cross-examination before the jury. *Cooper* v. *U.S.*, 5 C.C.A., 1937, 91 F. 2d 195; *Kolbrenner* v. *U.S.*, 5 C.C.A., 1926, 11 F. 2d 754; *Greenhill* v. *U.S.*, 5 C.C.A., 1962, 298 F. 2d 405. Appellant cites and relies heavily on *Loyd* v. *U.S.*, 226 F. 2d 9, 5 C.C.A., 1955. The reversal in that case was not pegged on any error in connection with the use of summaries, but of improper admission in evidence of an offer to compromise. It is perfectly proper that litigants be permitted the use of illustrative charts to summarize varying computations and to thus make the primary proof upon which such charts must be based more enlightening to the jury. The district judge did not abuse his discretion by permitting the use of these summaries.

As to the other errors assigned we have carefully reviewed the record and conclude that the alleged errors have not been substantiated. The defendant had a fair trial. The verdict is adequately supported by the evidence. The charge was fair and accurate; and the errors assigned being without validity, the judgment is AFFIRMED.

APPENDIX C

ORDER DENYING REHEARING —
FILED MAY 11, 1965

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21,202

PAUL E. McDANIEL,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

(May 11, , 1965)

ON PETITION FOR REHEARING

Before BROWN and BELL, Circuit Judges, and HUNTER, District Judge. PER CURIAM.

Upon considering the petition for rehearing filed by Appellant, it is ordered and decreed that said petition be and it hereby is DENIED.

APPENDIX D

CLERK'S CERTIFICATE.
UNITED STATES OF AMERICA
UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT.

I, Edward W. Wadsworth, Clerk of the United States Court of Appeals for the Fifth Circuit, do hereby certify that the foregoing pages numbered from 1831 to 1856 contain a full, true and complete copy of the following papers: Argument and submission, Opinion of the Court, Judgment, Petition for Rehearing and Brief in Support, Order Denying Rehearing

in a certain cause in said Court numbered 21202 wherein Paul E. McDaniel, is appellant and United States of America, is appellee,

as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 1830 is the printed record upon which said cause was heard and decided in the said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Court of Appeals at my office in the City of New Orleans, Louisiana, in the Fifth Circuit this 18th day of May, A.D., 1965.

EDWARD W. WADSWORTH
Clerk of the United States Court
of Appeals for the Fifth Circuit.

By /s/ CLARA R. JAMES
Chief Deputy Clerk

[SEAL]